

Supreme Court, U. S.
FILED

AUG 14 1976

MICHAEL RODAK, JR., CL

No. 75-1490

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1976

MAX ZIVIAK, ETC., APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MASSACHUSETTS

PLAINTIFF'S BRIEF IN OPPOSITION TO
DEFENDANT'S MOTION TO AFFIRM

LOUIS KERLINSKY, ESQ.
Attorney for Appellants
31 Elm Street
Springfield, Mass. 01103

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1976

NO. 75-1490

MAX ZIVIAK, ETC., APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MASSACHUSETTS

PLAINTIFF'S BRIEF IN OPPOSITION TO
DEFENDANT'S MOTION TO AFFIRM

1. It is clear that the statutory scheme in question as applied by the Veteran's Administration discriminates against parents of deceased veterans solely because of the incompetency of the veteran. See the Findings and Decision of the Board of Veteran Appeals herein dated January 30, 1974, a copy of which is attached to the Complaint, at p. 3, Opinion of Freedman, D.J. in the U. S. District Court in the case at bar (J.S.21) 411 F.S. 416, Berkey v. U.S., 361 F. 2d 983 (U.S. Ct. of cls. 1966) at p. 986. Had plaintiff's son died competent, payment of the withheld compensation would have been made.

2. The payments of the veterans withheld compensation provided by the statute to parents of competent veterans are not based on nor related to the parents' need for a particular amount of support and the purpose of the statute is not related to any such degree of need. The discretionary payments to parents of incompetents based on their need under 38 U.S.C. Section 3203(b)(3) which may be made during the lifetime of an incompetent veteran need not be in the same amount as the compensation paid to parents of competent veterans and were less than such an amount in this case. Section 3203(b)(3) does not assure equal treatment of parents of incompetent and competent veterans. It may merely reduce the amount of discrimination in some cases.

3. The purpose of the statute was not just to prevent the accumulation of compensation of institutionalized veterans. There is no such prohibition regarding competent veterans. The purpose is to prevent the accumulations from passing on the death of the veteran to remote relatives. See 105 Cong. Rec. 7320-7321 (1959). Parents were not deemed such remote relatives prior to the 1959 amendment to Section 3203(b). Parents of competent veterans are not deemed such remote relatives and to so classify parents of incompetent relatives is irrational.

The purpose of the provisions for payment to parents after the death of the veteran was not to provide for the needs of the veteran nor to enable him to enjoy or control the compensation he would have received during his lifetime. The vet-

eran's withheld compensation is paid to his parents after his death for his parents' benefit. There is no reason to differentiate between parents of competent veterans and parents of incompetent veterans. Nor is there any basis for finding that institutionalized incompetents as a class have lesser needs or enjoyments than institutionalized incompetents nor that their lack of control cannot be remedied by guardians even if such considerations were relevant. Constitutional rights should not be forfeited just to conserve public funds.

The Defendant's Motion to Affirm should be denied.

Respectfully submitted.

Louis Kerlinsky

LOUIS KERLINSKY, ESQ.
for Appellants
31 Elm Street
Springfield, Mass.